(17,580.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 466.

C. G. BLAKE AND ROGERS, BROWN & COMPANY, PLAINTIFFS IN ERROR,

vs.

CALVIN M. McCLUNG, WILLIAM P. SMITH, WILLIAM B. KEENER, FRANKLIN H. McCLUNG, JR., AND CHARLES J. McCLUNG, JR., PARTNERS AS C. M. McCLUNG & COMPANY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 9, 1899.

1 *Mandate.*

UNITED STATES OF AMERICA, *88:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Tennessee, [SEAL.] Greeting:

Whereas lately, in the supreme court of the State of Tennessee, before you or some of you, in a cause between C. G. Blake, Rogers, Brown & Co., Hull Coal & Coke Company, Julian Kennedy, and Clark & Reid, trustees, appellants, and Calvin M. McClung, William P. Smith, William B. Keener, Franklin H. McClung, Jr., and Charles J. McClung, Jr., partners as C. M. McClung & Company, *et al.*, appellees, wherein the judgment of the said supreme court entered in said cause on the 15th day of November, A. D. 1895, is in the following words, viz:

"This cause came on to be heard on this Nov. 15, 1895, before the hon. the supreme court of Tennessee upon the transcript of the record of the chancery court at Jonesboro and the court of chancery appeals at Knoxville and upon the appeal of Clark & Reid, trustees; Rogers, Brown & Co, Hull Coal & Coke Co., Julian Kennedy, and C. G. Blake from the decree of the court of chancery appeals and upon the writs of error of Rogers, Brown & Co., the Hull Coal & Coke Co., and C. G. Blake to the chancery court at Washington Co., Tennessee, and the motion to dismiss said writ of error, which motion is overruled and disallowed, and upon the written opinion and findings of facts of the chancery court of appeals and the assignments of error thereto by the appellants, and the answer of the appellees to said assignments of error, and upon consideration the court is of opinion that there is no error of the court of chancery appeals and doth accordingly order, adjudge, and decree that said decree be, and the same is, accordingly confirmed.

It is therefore decreed by the court as follows:

1. That the defendants Clark & Reid took and held the
2 naked legal titles to the lands in question in trust for the Embreeville Freehold Land, Iron & Railway Co (Limited), under the deed from James Gordon Miller dated Jan'y 16, 1890, as a mere naked, dry trust, and that there was no parol or other agreements either before or at the time that they should hold the legal title to said lands in trust for the debenture-holders or any of them, and that the said debenture-holders have no lien upon the said lands for the security of the debentures so held by them.

2nd. That the trust deeds executed to secure the debenture bonds issued by the company were not registered until after this insolvent proceeding was instituted, and that said trust deeds constitute no security and did not give the owners of the debenture bonds any right and priority of payment over the other creditors of the Embreeville Freehold Land, Iron & Railway Co. out of the proceeds of said lands which were sold in this cause.

That the act of the General Assembly of Tennessee passed M'ch

19; 1877, and approved March 21, 1877, chapter 31st, entitled "An act to declare the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold, and conver real and personal property in this State," is in all respects a valid *inactment* and is not in contravention of paragraph 2, article IV or article 14, amendments to the Constitution of the U. S., nor in contravention of any other provision of the Constitution of the U. S., and the court further finds that said court of chancery appeals erred in determining that the question of the *of the* construction of the said act was not properly presented to said court under the general appeals prosecuted therein, and that portion of the said findings of the court of chancery appeals is reversed.

3rd. That all of the holders and owners of the debenture bonds of the Co. are simple contract creditors of said Co. and stand upon the same footing with reference to the distribution of the assets of the Co. as all of its other creditors who reside out of the State
3 of Tennessee, whether they be residents of other States or of the Kingdom of Great Britain.

4th. That all of the creditors of the Embreeville Freehold Land, Iron & Railway Co. (Limited) who resided in the State of Tennessee are entitled to priority of payment out of all of the assets of said Co., both real and personal, over all of the other creditors of said Co. who do not reside in the State of Tennessee, whether they be residents of other States of the U. S. or of the Kingdom of Great Britain; that all of the creditors of the Embreeville Freehold Land, Iron & Railway Co. who reside out of the State of Tennessee, whether they reside in the other States of the U. S. or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company after the residents of the State of Tennessee shall have been first paid in full.

5th. That Clark & Reid, trustees, are not entitled to compensation for their services or to have their solicitors' fees for their services in this cause paid out of the proceeds of the property of the Embreeville Freehold Land, Iron & Railway Co. (Limited), but may have same out of funds coming to debenture-holders.

6th. That the relative priorities of the original debenture-holders and the so-called prior lien of the debenture-holders is left open for settlement by them or their trustees or to the adjudication by the chancellor.

7th. That this cause be remanded to the chancery court at Jonesboro for further proceedings, in accordance with this decree and the decree of the court of chancery appeals, and that all of the costs of the cause shall be paid out of the funds in court.

8th. That on application of Messrs. Ingersoll & Peyton, Chas. Seymour & S. C. Williams, solicitors for various petitioners, liens are declared on the sums which shall be due their several clients under this decree for reasonable fees for their services in this cause. It is further decreed that a reasonable fee shall be paid to Green & Shields and Deadrick & Epps, the solicitors filing this general cred-

itors' bill, out of the funds in court, for their services in filing
4 the bills and prosecuting this insolvent proceeding, and the same shall be taxed as part of the costs of this cause.

A reference as to what would be a reasonable fee for their said services may be had in the chancery court at Jonesboro.

Judge McAlister, being incompetent by *relation* of relationship to one of the parties, did not participate in the hearing and decision of this cause."

As by the inspection of the transcript of the record of the said supreme court, which was brought into the Supreme Court of the United States by virtue of a writ of error sued out by C. G. Blake, Rogers, Brown & Co., and the Hull Coal & Coke Co., agreeably to the act of Congress in such case made and provided, fully and at large appears;

And whereas in the present term of October, in the year of our Lord one thousand eight hundred and ninety-eight, the said cause came on to be heard before the Supreme Court of the United States on the said transcript of record and was argued by counsel:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause as to the Hull Coal & Coke Company be, and the same is hereby, affirmed with costs, and as to the other plaintiffs in error be, and the same is hereby, reversed with costs, and that the said C. G. Blake and Rogers, Brown & Co. recover against the said appellees, Calvin M. McClung *et al.*, partners as C. M. McClung & Company, *et al.*, four hundred and sixty dollars and sixty cents for their costs herein expended, and have execution therefor.

And it is further ordered that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings not inconsistent with the opinion of this court.

December 12, 1898.

5 And the same is hereby remanded to you, the said judges of the said supreme court of the State of Tennessee, in order that such execution and further proceedings may be had in the said cause, in conformity with the judgment and decree of this court above stated, as according to right and justice and the Constitution and laws of the United States ought to be had therein, the said writ of error notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 14th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

Costs of Blake & Rogers, Brown & Co. ($\frac{2}{3}$ of total):

Clerk	$403 66
Printing record	57 00
	$460 66

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Supreme Court of the United States. No 6, October term, 1898. C. G. Blake, Rogers, Brown & Co., *et al. vs.* Calvin M. McClung *et al.* Filed April 28th, 1899. J. G. Stuart, deputy clerk. Mandate.

6 *Motion for Judgment on Mandate.*

C. M. McClung & Company et al.
vs.
Embreeville Freehold Land, Iron — Railway Company (Limited) *et al.*

C. G. Blake and Rogers, Brown & Company, by their solicitor, move the court for decrees in their favor under the mandate and opinion in Blake *vs.* McClung, 172 U. S., 239, the form of decree suggested being set out in the memorandum brief herewith submitted.

TULLY R. CORNICK, *Sol.*

Filed September 20th, 1899.
J. G. STUART, *D. C.*

7 Transcript of opinion and decree on mandate of the United States Supreme Court in case of C. M. McClung *et al. vs.* Embreeville Freehold, Land, Iron & Railway Company, Limited, *et als.*

C. M. McClung & Company
vs.
The Embreeville Freehold, Land, Iron & Railway Co.

Opinion.

This case, as presented now, involves alone a controversy between adversary counsel, with regard to the nature of the decree which should be entered under the mandate of the Supreme Court of the United States.

The Embreeville Freehold, Land, Iron & Railway Company, (Lmtd.), a corporation organized under the laws of Great Britain and Ireland for mining and manufacturing purposes, after registering its charter in this State, as required by chapter 31 of the Acts of 1877, began business, which in a few years ended in insolvency. In 1893 the present complainants filed the bill in this cause as a general creditors' bill, for the purpose of winding up the insolvent corporation. Among its creditors were citizens of the State of Tennessee, citizens of other States of the United States, and citizens of Great Britain and Ireland. The cause was regularly conducted as an insolvent proceeding until, the case having reached this court, a final decree was pronounced, in which, among other things, it was adjudged, that

8 under the 5th section of the act already referred to, Tennessee creditors had a priority in the distribution of the assets of this corporation over simple contract creditors of all other countries. The effect of this decree was to place creditors, whether citizens of other States of the United States or citizens of foreign

countries, upon the same footing, and to postpone all alike until the Tennessee creditors were fully satisfied. Among the creditors affected by this decree were C. G. Blake, and Rogers, Brown & Company, citizens of the State of Ohio, and the Hull Coal and Coke Company, a corporation of Virginia, who were of the class of simple contract creditors of this insolvent corporation. Being dissatisfied with this decree, these parties sued out a writ of error from the Supreme Court of the United States. Upon a hearing in that court, it was held, reversing the decree of this court, that the 5th section of the act of 1877, in so far as it gave priority to home creditors over creditors of the same class of other States of the Union, was in violation of the 2d section of the fourth article of the Constitution of the United States, which provides that "the citizens of each State shall be entitled to all privileges and immunities in the several States;" but it is also held that a corporation, created under the laws of another State of the United States was not a "citizen" within the meaning of this clause of the Constitution. The result was that a judgment was entered affirming the judgment of this court as to the Hull Coal & Coke Company, and reversing it as to C. G. Blake, and Rogers, Brown & Co., and remanding the cause for further proceedings not inconsistent with the opinion delivered in that court. This opinion is reported in vol. 172, p. 239 of United States Supreme Court Reports. The respective counsel of Blake, and Rogers, Brown & Company, and of the Tennessee creditors and alien creditors of this corporation, differ radically in their construction of the opinion and mandate.

9 The contention for the first-named creditors is that the judgment of the Supreme Court of the United States places them in the same class with the Tennessee creditors, and that, with the latter, they are entitled to full satisfaction of their claims before the Hull Coal & Coke Company and the foreign creditors are let in to share in the distribution of the assets of this corporation. On the other hand, the contention of the Tennessee and foreign creditors is that the mandate of that court is fully satisfied when these Ohio creditors are permitted to participate as general creditors in this distribution, without priority over any one, and that when they have received their *pro rata*, on the basis of all creditors being included, then they shall stand aside and the Tennessee creditors, taking under the act of 1877, are to be satisfied, and when this is done, then the Hull Coal & Coke Co. and the foreign creditors can take *pro rata* of the balance of the assets, if any.

Under this contention, the claims of all creditors, without regard to this statutory preference, are to be tabulated for the purpose of ascertaining the *pro rata* to be paid to each, and when so ascertained, and the shares of these Ohio creditors are paid to them, the whole of the balance of the assets of the corporation must be applied, if need be, to the extinguishment of the Tennessee claims, and thereafter as already indicated.

The insistence of the Ohio creditors is rested upon the opinion of that court, the gist of which is found in the following paragraph:

"We adjudge that when the general property and assets of a private corporation, lawfully doing business in a State, are in course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the constitution of the States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality
10 of right simply because they do not reside in that State but are citizens residing in other States of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be corporations of that State; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not citizens of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee."

It is contended by these creditors that in this paragraph the court, in express terms, announced the rule of equality between themselves and the Tennessee creditors, and that this equality can only be secured by giving them the same preference in distribution which the latter creditors have secured to them under the statute.

On the other hand, the creditors, citizens of Tennessee, the foreign creditors as well as the Hull, Coal & Cook Co., insist that the Supreme Court of the United States, by its opinion, has expressly recognized the 5th section of the act of 1877 as within the constitutional power of the legislature of the State, save as it sought to place in an inferior and subordinate class creditors who were citizens of other States of this Union, and that by the express terms of that act the home creditors are preferred, and that to give these Ohio creditors the same preference would be to do so when not only they are not named in the act, but when they have successfully impeached, as unconstitutional, that part of it which refers to the class of creditors to which they belong.

It is further insisted by them that the Supreme Court of the United States did not, by its mandate, intend to direct this court to interpolate the act of 1877 with a provision giving preference to creditors who had repudiated it, but that its mandate is fully complied with when this court, in favor of the Ohio creditors, directs an administration of the assets of this insolvent corporation
11 so as to give them full and proportionate shares, as if this act was not in existence; and that having thus done equity in their favor, the 5th section of this act immediately becomes operative, under the terms of which complainants, as preferred creditors, work out a satisfaction of their claims.

A majority of the court adopt this latter view, believing it to be a sound construction of the mandate; and a decree will be entered in accordance with it.

In this view, I do not concur.

While it is possible the Supreme Court of the United States did not have in mind this phase of the question, yet I think in its opinion there is laid down in general, but clear and unmistakable,

terms, a rule under which the Ohio creditors are entitled to what they now claim. That court has said that, so far as they were concerned, the fifth section of the act was void because violative of that clause of the Federal Constitution which provides, "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," and the case has been remanded to this court with direction that we see no advantage accrues to home creditors over the Ohio creditors. It is evident that, administering the assets as it is now adjudged shall be done, a valuable "privilege" is secured to the Tennessee creditors of which the Ohio creditors are deprived.

I think this is in the face of the opinion and mandate.

BEARD, *J.*

12 *Decree of Supreme Court.*

Supreme Court of Tennessee, at Knoxville, September Term, 1899.

TUESDAY, *September* 19, 1899.

Court met pursuant to adjournment.

Present and presiding: The Honorable Chief Justice D. L. Snodgrass and the Honorable Associate Justices W. C. Caldwell, Jno. S. Wilkes, and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:

MONDAY, *October 9th*, 1899.

Court met pursuant to adjournment, &c.

C. M. MCCLUNG ET ALS.
vs.
EMBREEVILLE FREEHOLD, LAND, IRON & RAILWAY CO., LTD., *et als.*

This cause was heard on the motion of C. G. Blake and Rogers, Brown & Company, for the entry of judgment and decree pursuant to the opinion and mandate of the Supreme Court of the United States, pronounced in the cause, lately pending in said court, entitled C. G. Blake *v.* C. M. McClung *et als.*, under the writ of error sued out to the said Supreme Court of the United States from this court, from the final judgment and decree of this court, as pronounced on the 15th day of November, 1895, and upon the transcript of the record and former decree of this court. And argument of counsel for all of the several parties in interest having been heard, it is, upon due consideration of all the several questions involved, ordered, adjudged, and decreed by this court, as follows:

1. That the effect and purpose of the opinion and mandate of the Supreme Court of the United States in respect to the rights of C. G. Blake and Rogers, Brown & Company, is to adjudge and decree that the said C. G. Blake and Rogers, Brown & Company are entitled to participate in the assets of the said Embreeville Freehold, Land, Iron & Railway Co., Ltd., upon the basis of a broad distribution of

the assets of said corporation among all of its creditors, without
13 preference or priority, as though the act of 1877, chap. 31, had not been passed; and it is ordered that there be made a computation of the aggregate indebtedness due from the said insolvent corporation to its creditors of every class, wherever residing, and that there shall be paid to the said C. G. Blake, and the said Rogers, Brown & Company, the percentage and proportion which is found to be due to them as creditors of said corporation in the aggregate of assets thus ascertained.

2. It is further adjudged and decreed, that after thus setting apart to the said C. G. Blake, and Rogers, Brown & Company the proportion and percentage thus found to be due to them, that all the rest and residue of the estate of the said Embreeville Freehold, Land, Iron, and Railway Company, Limited, is applicable first to the payment of the indebtedness due to the creditors of said corporation residing within the State of Tennessee, as provided in section 5 of chapter 31 of the Acts of Tennessee, 1877, and that the residue of said estate, if any, shall then be applied *pro rata* to the payment of the debts of the alien and non-resident creditors of said corporation, other than the said C. G. Blake, and Rogers, Brown & Company.

3. It is further adjudged that the said C. G. Blake, and Rogers, Brown & Company, have and recover of the defendants, on the writ of error sued out to the Supreme Court of the United States, C. M. McClung *et als.*, the sum of seven hundred and thirty-three and $\frac{88}{100}$ ($733.88) dollars, and of the said Hull Coal & Coke Co., the sum of two hundred and forty-one and $\frac{87}{100}$, ($241.87) dollars, being the costs expended in the prosecution of the writs of error to the Supreme Court of the United States, subject, nevertheless, to a credit of one hundred and twenty-five ($125.00) dollars, in favor of
14 said Hull Coal & Coke Company, which said sum it is admitted the said last-named company contributed to the payment of the costs incurred in said Supreme Court, under the prosecution of said writs of error; and for these sums executions are awarded.

This cause will be remanded to the chancery court of Washington county for the collection and distribution of the fund now in said court, and for the making of such further orders as may be found necessary to the final settlement of the cause.

4. On the hearing of this cause the said C. G. Blake, and Rogers, Brown & Company, by their counsel, except to the action of the court in determining that creditors residing in Tennessee are entitled, under the act of 1877, chap. 31, sec. 5, to any priority or preference, by way of increased percentages in distribution, over the said C. G. Blake, and Rogers, Brown & Company, upon the ground that such priority and preference is in violation of section 2 of article 4 of the Constitution of the United States, and is not consistent with the opinion pronounced, and the mandate issued from the Supreme Court of the United States under the writ of error sued out herein, and above referred to.

15 In the Supreme Court of Tennessee.

C. M. McClung & Company et al.
vs.
Embreeville Freehold, Land, Iron & Railway Company (Limited) *et al.*

Assignments of Error.

Charles G. Blake and Rogers, Brown & Company, by their solicitors, feeling themselves to be aggrieved by the findings and decree of the supreme court of Tennessee in the above entitled cause, made and entered in said court on October 9th, 1899, assign error thereto as follows, to wit:

I.

That the decree of the supreme court and the opinion of said court upon which said decree of October 9th, 1899, is based are not consistent with the opinion and mandate of the Supreme Court of the United States under the writ of error sued out to said court, decision whereunder was rendered by said Supreme Court of the United States as reported in Blake *vs.* McClung, 172 U. S., pp. 239 *et seq.*

II.

That in and by the opinion of the Supreme Court of the United States and the mandate issued thereunder in said case of Blake *vs.* McClung, it was declared that—

"No rule of distribution of its assets (meaning thereby the assets of the defendant The Embreeville Freehold, Land, Iron & Railway Company (Limited), among creditors, could be applied to them (the appellants herein) as resident citizens of Ohio, and because they were not citizens of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee."

And it is assigned as error that under the decree of October 9th, 1899, a broad distribution is declared in favor of the appellants herein, and that after such distribution has been made the balance of the estate belonging to said debtor to the extent that the same shall be necessary is adjudged to be applied to the payment
16 in full of the demands of Tennessee creditors and to the exclusion of appellants.

III.

That the basis of distribution decreed by the supreme court of Tennessee in favor of citizens of Tennessee under said decree of October 9th, 1899, gives preference to citizens of Tennessee inconsistent with and in contravention of section 2, clause 1, article 4, of the Constitution of the United States, and that such decree is in contravention of and is repugnant to the said provisions of the said Constitution of the United States.

IV.

That the court erred in entering the decree of October 9th, 1899, in favor of the creditors residing within the State of Tennessee, over the objection and exception of the plaintiffs in error.

Wherefore these appellants pray that for the errors assigned said findings and decree may be reversed.

CHARLES G. BLAKE,
ROGERS, BROWN & COMPANY,
By TULLY R. CORNICK, *Sol.*

HEBER J. MAY,
TULLY R. CORNICK, *Solicitors.*

Filed November 18th, 1899. ALEX. McMILLAN, *Clerk.*

17 *Bond for Writ of Error.*

Filed Nov. 18, 1899. Alex. McMillan, Clerk.

Supreme Court of Tennessee.

C. M. McCLUNG & COMPANY ET AL.
vs.
EMBREEVILLE FREEHOLD, LAND, IRON & RAILWAY COMPANY (Limited) *et al.*

Know all men by these presents that we, Chas. G. Blake and Rogers, Brown & Company, as principals, and Tully R. Cornick, as surety, are held and firmly bound unto C. M. McClung & Company and others in the penal sum of one thousand ($1,000.00) dollars, to be paid to the said C. M. McClung & Company and others, their heirs and assigns; for which payment, well and truly to be made, we bind ourselves and each of us, and each and every of our several heirs, executors, and administrators, jointly and severally, by these presents.

Witness our hands and seals on this *on this* 18 day of November, A. D. 1899.

Whereas the above-named Charles G. Blake and Rogers, Brown & Company have prosecuted a writ of error to the United States Supreme Court, to be holden at Washington, to reverse the decree rendered in the above-entitled suit in said court by the judges of the supreme court of Tennessee;

Now, therefore, the condition of this obligation is such that if the above-named C. G. Blake and Rogers, Brown & Company shall prosecute said writ of error to effect and answer all damages and costs if they fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

C. G. BLAKE, [SEAL.]
By TULLY R. CORNICK, *Att'y.*
ROGERS, BROWN & COMPANY, [SEAL.]
By TULLY R. CORNICK, *Att'y.*
TULLY R. CORNICK. [SEAL.]

Approved:
D. L. SNODGRASS,
Chief Justice Supreme Court of Tennessee.

18 Circuit Court of the United States, Eastern District of Tennessee, Northern Division.

The President of the United States of America to the honorable the judges of the supreme court of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in the said suit between C. M. McClung & Co. *et al.* and the Embreeville Freehold, Land, Iron & Railway Company *et al.*, a manifest error hath happened, to the great damage of Charles G. Blake and Rogers, Brown & Company, a firm composed of Wm. A. Rogers, Archer Brown, Daniel B. Meacham, M. Cochran Armour, and William C. Herron, all citizens of the State of Ohio and parties to and interested in said cause, wherein was drawn in question the validity of a statute of or an authority exercised under the laws of said State as being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity;

And because it further appears that under the mandate of the Supreme Court of the United States issued in the cause lately pending in said court entitled C. G. Blake and others, plaintiffs in error, *vs.* Calvin M. McClung and others, defendants in error, it was ordered that further proceedings be had in said cause not inconsistent with the opinion of the said Supreme Court of the United States pronounced therein;

And because manifest error hath happened in the rendition of said judgment and decree, to the great damage of the said C. G. Blake and Rogers, Brown & Company, as by their complaint appears, we, being willing that that error, if any hath been,

19 should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the 1st Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of November, in the year of our Lord one thousand eight hundred and ninety-nine (1899).

[The Seal of the Circuit Court, District of East Tenn.]

HENRY O. EWING, *Clerk*,
By J. T. CARTER,
Dep. Clerk United States Circuit Court,
Eastern District of Tenn.

Allowed by—
D. L. SNODGRASS, *Ch. J. Sup. Ct. Tenn.*

A true copy of the above and foregoing writ of error was lodged with me in the office of the clerk of the supreme court of Tennessee, at Knoxville, on November 18th, 1899, at 2.30 o'clock p. m.

ALEX. McMILLAN,
Clerk of Supreme Court of Tenn.

Fee for this writ, $1.00. Paid by T. R. Cornick, Esq., Nov. 18, 1899.

J. T. CARTER, *Dep. Clerk.*

20 *Citations.*

United States of America to—

Calvin M. McClung, William P. Smith, William B. Keener, Franklin H. McClung, Jr., and Chas. J. McClung, Jr., partners in trade as C. M. McClung & Company;

James D. Cowan, Charles J. McClung, Matthew McClung, Jacob L. Thomas, and Robert M. Rhea, partners in trade as Cowan, McClung & Company;

William B. Lockett, A. Percy Lockett, and Edward Lockett, partners in trade as W. B. Lockett and Company;

Rush S. Hazen and J. Orville Lotspeich, partners in trade as Hazen & Lotspeich;

The Knoxville Provision and Sugar Company, a corporation under the laws of Tennessee;

Samuel Spencer, receiver of the East Tennessee, Virginia and Georgia Railway Company;

Ogden Brothers & Company, a corporation under the laws of Tennessee;

C. R. Love, doing business as C. R. Love & Company;

Daniel M. Haynes & Tilman W. Haynes, partners in trade as Haynes Brothers;

Samuel P. Evans, receiver of the Pioneer Coal & Coke Company, a corporation under the laws of Tennessee;

R. N. Dosser, A. T. Dosser, and F. F. Dosser, partners in trade under the firm name of Dosser Brothers;

J. H. Jones, assignee of the late firm of Garber Brothers;

Jno. N. Blair, doing business under the firm name of Blair Brothers;

The Dent Mining Company, a corporation, of which H. C. Dent is manager;

Jno. Isaac Cox, receiver of the First National Bank of Johnson City, a banking corporation, etc.;

The Jonesboro Banking & Trust Company, a corporation, etc.;

H. C. Jackson, Eliza C. Murphy, Mary C. Carter, Addie J. Fuller and her husband, C. L. Fuller; Mollie Yonce and her husband, Colain Yonce; Ollie McDade and her husband, R. S. McDade; Ida Jones and her husband, L. O. Jones; Mattie Wilson and
21 her husband, Joseph Wilson; Lillie Smyth and her husband, T. S. Smyth, and Matt Jackson (all of Tennessee); Lillie J. Rogan and her husband, James W. Rogan, of Maryland; Charles B. Jackson, of Kansas; Sallie Glen and her husband, D. A. Glen, of North Carolina (tenants in common, etc.); Isaac E. Reeves, receiver of J. J. Hunt & Company;

Charles K. Lide, C. F. Decker, T. J. Brown, —— Biddle, and —— Ellsworth, partners in trade as Biddle & Ellsworth;.
Sweetwater Mill Company, a corporation, etc.;
C. L. Rogers, assignee of O'Connell & Rogers;
Sterling Dynamite Company, a corporation under the laws of Tennessee;
Montague & Company, a corporation under the laws of Tenn.;
R. H. Dungan, J. P. White, Robert W. Blair, —— Lingenfelter, and —— Krichbaum, partners in trade as Lingenfelter and Krichbaum;
W. L. Martin, W. E. Bullock, L. W. McKensie, A. L. Estil;
John Epps, assignee A. R. Wing;
Greer Machinery Company, a corporation under the laws of Tennessee;
Buckeye Coke Company, a corporation under the laws of Tenn.;
H. Victor Hart, James E. Deakins;
Johnson City Foundry & Machine Co., a corporation, etc.;
Hugh H. Kirkpatrick,
William J. Love,
The above being Tennessee creditors;
Covington Machine Works, a corporation under the laws of Virginia;
The Fairbanks Company, a corporation under the laws of New Jersey, Baltimore, Md.;
Queen & Company, a commercial house of Phila., Pa.;
Elmer & Amend, a commercial house of New York city;
American Bridge & Iron Works, a corporation under the laws of Virginia, Roanoke, Va.;
Williamsport Wire Works, a corporation under the laws of
22 Pennsylvania, Williamsport, Pa.;
Wilson Snyder Mfg. Co., a Pennsylvania corporation, of Pittsburgh, Pa.;
A. S. Cameron Steam Pump Company, a New York corporation, of New York city;
Nathan Mfg. Company, a New York corporation, of New York city;
Julian Kennedy, residing at Pittsburgh, Pa.;

And the following persons, firms, and corporations residing in the United Kingdom of Great Britain and Ireland:

Jno. Morris, Frank Crisp, and William Morris, partners, composing the firm of Ashurst, Morris, Crisp & Company;
Frank Crisp, as an individual;
Edward Ardley, doing business as Ardley & Company;
Chas. H. Bright and Chas. H. Cox, partners under the firm name of Bates, Hendy and Company;
Frederick C. Mathieson, Frederick C. Mathieson and James F. Mathieson, partners as F. C. Mathieson & Sons;
William A. Stone, William Cash, and Herbert a Plumb, partners under the firm name of Cash, Stone and Plumb;
Bradbury, Wilkinson and Company, a corporation;
United Kingdom and Foreign Investment Co., a corporation;

Union Mortgage Co., a corporation;
The Commercial Bank of Scotland, a corporation;
London Real Estate Company, a corporation;
London Trust Company, a corporation;
Lord Hampden,
Rev. Hugh Flemming,
Thos. Reid,
Sir Andrew Clark,
W. C. Prescott,
Lord Cloncurry,
Ernest S. Inman,
P. McFayden,
J. Campbell Dick,
Alfred Bull,
23 George W. Lakeman,
W. J. Brooks,
F. Denton,
Miss E. H. Robins,
W. Alcock,
Sir Andrew Clark and Thomas Reid, trustees, and The Embreeville Freehold, Land, Iron & Railway Company, Limited, a corporation, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of Tennessee, wherein Charles G. Blake and Rogers, Brown & Company are plaintiffs in error and you are defendant- in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable David L. Snodgrass, chief justice of the supreme court of Tennessee, this 18 day of November, in the year of our Lord eighteen hundred and ninety-nine (1899).

D. L. SNODGRASS,
Ch. J. Sup. Ct. Tenn.

We hereby acknowledge service of the within and foregoing citation for and in behalf of all of the parties named therein this Nov. 18, 1899.

GREEN & SHIELDS, *Sols.*
S. C. WILLIAMS.
LEON JAUROLMON.
HENRY H. INGERSOLL.

24 *Certificate.*

Office of the clerk of the supreme court for the eastern division of the State of Tennessee.

I, Alex. McMillan, clerk of said court, do hereby certify that the foregoing is a true, perfect, and complete copy of the opinion and decree of the supreme court since the remand from the United States Supreme Court pronounced at its September term, 1899, and also a true and correct copy of the assignments of error, bond for writ of error, writ of error, and citations in the case of C. M. McClung & Company *et al. vs.* Embreeville Freehold, Land, Iron & Railway Co. (Limited) *et al.* as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in Knoxville, Tenn., on this the 20th day of November, 1899.

[Seal of the Supreme Court, Knoxville, Tenn.]

ALEX. McMILLAN, *Clerk*,
By —— ——, *D. C.*

STATE OF TENNESSEE:

I, D. L. Snodgrass, chief justice of the supreme court of Tennessee, do hereby certify that the foregoing attestation is in due form and by the proper officer.

Given under my hand this 20th day of November, 1899.

D. L. SNODGRASS,
Chief Justice Supreme Court of Tennessee

Fee for this transcript, $9.55.
Paid by T. R. Cornick, Esq., Nov. 20, 1899.

J. G. STUART, *Dep. Clerk.*

Endorsed on cover: File No., 17,580. Tennessee supreme court. Term No., 466. C. G. Blake and Rogers, Brown & Company, plaintiffs in error, *vs.* Calvin M. McClung, William P. Smith, William B. Keener, Franklin H. McClung, Jr., and Charles J. McClung, Jr., partners as C. M. McClung & Company, *et al.* Filed December 4, 1899.

Office Supreme Court U. S.
FILED
DEC 18 1899
JAMES H. McKENNEY,
Clerk

No. 466.

Brf. of Cornick & May for P.

Filed Dec. 18, 1899.

Supreme Court of the United States.

OCTOBER TERM, 1899

O. G. BLAKE AND ROGERS, BROWN & COMPANY, Plaintiffs in Error,

vs.

CALVIN M. McCLUNG, WILLIAM P. SMITH, WILLIAM B. KEENER, FRANKLIN H. McCLUNG, Jr., AND CHARLES J. McCLUNG, Jr., PARTNERS AS C. M. McCLUNG & COMPANY, et al.

No. 466.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

Brief for Plaintiffs in Error.

TULLY R. CORNICK,
HEBER J. MAY,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

C. G. BLAKE, AND ROGERS, BROWN & COMPANY, Plaintiffs in Error,

vs.

CALVIN M. McCLUNG, WILLIAM P. SMITH, WILLIAM B. KEENER, FRANKLIN H. McCLUNG, Jr., AND CHARLES J. McCLUNG, Jr., PARTNERS AS C. M. McCLUNG & COMPANY, *et al.*

No. 466.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

STATEMENT.

This cause has been before this Court before upon a writ of error. The final judgment of the Supreme Court of Tennessee was then reversed as to the present plaintiffs in error, and the cause remanded for further proceedings *not inconsistent* with the opinion then delivered. The mandate, which will be found on pages 1 to 4 of the record, went down in course, and a motion was

made by the solicitor of Blake, and Rogers, Brown & Company for the entry of a decree in their favor in accordance with the mandate and opinion in *Blake* v. *McClung* (172 U. S., 239). The Supreme Court of Tennessee proceeded with the consideration of the motion, and finally entered a decree, which will be found on pages 7 and 8 of the record. Mr. Justice Beard dissented to this decree, for reasons given in the opinion of the court. (Record, 6, 7.)

The opinion of the Supreme Court of Tennessee has been printed. (Record, 4, 7.)

To the action of the Supreme Court of Tennessee in entering its decree upon the mandate of this Court, the plaintiffs in error only excepted. (Record, 8.) A writ of error was allowed by the Chief Justice of the Supreme Court of Tennessee. (Record, 11.) Service of citation was acknowledged. (Record, 14.) The assignment of errors will be found on pages 9 and 10 of the record.

BRIEF.

We contend that the Supreme Court of Tennessee has mistaken or misconstrued the mandate of this Court in *Blake* v. *McClung* (172 U. S., 239), which reversed the decree of the former Court as to C. G. Blake, and Rogers, Brown & Company, and has entered a decree inconsistent with said mandate and the opinion of this Court.

The question then before this Court, as presented for adjudication by the writ of error of Blake, and Rogers, Brown & Company, was as to the status of the said

plaintiffs in error under what was claimed to be an unconstitutional statute of Tennessee. Blake, and Rogers, Brown & Company contended from the first, and the sole object of their writ of error was to sustain such contention, that they were entitled to the same status and privilege in the distribution of the assets of the Embreeville Company that had been adjudged to the resident creditors of Tennessee, and this Court sustained their contention.

The assignments of error and the argument of counsel proceeded upon this basis. Of course it was necessary in order to reach the primary object contended for by Blake, and Rogers, Brown & Company, namely, to give them the same privilege in the distribution of the assets of the Embreeville Company as the Tennessee creditors, to destroy, by judicial determination, the effect of the void statute of the State of Tennessee. This was done in this Court by them upon their writ of error, and the benefit of the reversal of the decree upon said writ of error resulted to them only, inasmuch as the decree as to the Hull Coal and Coke Company, their co-plaintiff in error, was affirmed.

Our contention is that the decree of the Supreme Court of Tennessee has been reversed as to Blake, and Rogers, Brown & Company by this court, and that the effect of the reversal is to place the said parties in the category of the Tennessee creditors in the matter of distribution, and that all the other parties to the suit and decree below are left undisturbed as to such distribution, and in every respect, and that the decree of the court below is in force

as to them in the same manner as if no such reversal had occurred.

There were no parties before the Supreme Court of the United States except the parties to the writ of error, and these parties, under the motion for an order of severance, were limited to C. G. Blake, and Rogers, Brown & Company and the Hull Coal and Coke Company.

The refusal on the part of the Supreme Court of the United States to adjudge the supposed rights of the alien creditors was necessarily attributable to the fact that they were not before the court (*i. e.*, they had not taken writs of error), and the briefs then filed by their counsel did not change the status they have at all times occupied as parties acquiescent in the decree of the Supreme Court of Tennessee.

The decree of the Supreme Court of Tennessee, giving precedence to the creditors residing within Tennessee, is necessarily conclusive, except in respect to the parties to the proceeding who prosecuted successfully a writ of error and reversed the judgment of that court.

The effect of this reversal is to draw the parties in whose favor the judgment of reversal is pronounced to the class preferred under the decree of the Supreme Court of Tennessee, namely, the Tennessee creditors; and to authorize a distribution of assets, first in favor of such Tennessee creditors and Blake, and Rogers, Brown & Company as a class, and second to the foreign creditors, according to the terms of the original decree, which is unreversed as to them, as another class.

Mr. Justice Beard has stated our position in his dissent

to the majority opinion of the Supreme Court below. It is as follows (Record, 6, 7):

"While it is possible the Supreme Court of the United States did not have in mind this phase of the question, yet I think in its opinion there is laid down in general, but clear and unmistakable, terms a rule under which the Ohio creditors are entitled to what they now claim. That Court has said that, so far as they were concerned, the fifth section of the act was void, because violative of that clause of the Federal Constitution which provides that 'the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States,' and the case has been remanded to this Court with direction that we see no advantage accrues to home creditors over the Ohio creditors. It is evident that, administering the assets as it is now adjudged shall be done, a valuable 'privilege' is secured to the Tennessee creditors of which the Ohio creditors are deprived. I think this is in the face of the opinion and mandate."

The fourth paragraph of the original decree (Original Record, 69), which was reversed by this Court (*Blake* v. *McClung*, 172 U. S., 239), reads as follows:

"4th. That all of the creditors of the Embreeville Freehold, Land, Iron, and Railway Company (Limited), who resided in the State of Tennessee, are entitled to priority of payment out of all of the assets of said company, both real and personal, over all of the other creditors of said company, who do not reside in the State of Tennessee, whether they be residents of other States of the United States, or of the Kingdom of Great Britain; and all of the creditors of the Embreeville Freehold, Land, Iron and Railway Company, who reside out of the State of Tennessee, whether they reside in the other States of the United States or in the Kingdom of Great Britain, have the right and must share equally and ratably in the distribution of said funds of the said company, after the residents of the State of Tennessee shall have been first paid in full."

The paragraphs of the decree entered upon the mandate of this Court (Record, 7, 8), and which purport to give effect to the opinion and mandate in *Blake* v. *McClung*, *supra*, read as follows:

"1. That the effect and purpose of the opinion and mandate of the Supreme Court of the United States in respect to the rights of C. G. Blake and Rogers, Brown & Company, is to adjudge and decree that the said C. G. Blake and Rogers, Brown & Company are entitled to participate in the assets of the said Embreeville Freehold, Land, Iron & Railway Company, Limited, upon the basis of a broad distribution of the assets of said corporation among all of its creditors, without preference or priority, as though the act of 1877, Chap. 31, had not been passed; and it is ordered that there be made a computation of the aggregate indebtedness due from the said insolvent corporation to its creditors of every class wherever residing, and that there shall be paid to the said C. G. Blake, and the said Rogers, Brown & Company, the percentage and proportion which is found to be due to them as creditors of said corporation in the aggregate of assets thus ascertained.

"2. It is further adjudged and decreed that after thus setting apart to the said C. G. Blake and Rogers, Brown & Company the proportion and percentage thus found to be due to them, that all the rest and residue of the estate of the said Embreeville Freehold, Land, Iron & Railway Company, Limited, is applicable first to the payment of the indebtedness due to the creditors of said corporation residing within the State of Tennessee, as provided in section '5' of Chapter 31 of the Acts of Tennessee, 1877, and that the residue of said estate, if any, shall then be applied pro rata to the payment of the debts of the alien and non-resident creditors of said corporation, other than the said C. G. Blake and Rogers, Brown & Company."

By a comparison of these decrees it will be seen that the Supreme Court of Tennessee has, by another but some-

what similar method, practically re-enacted its former decree, and continued, in effect, the same discrimination against Blake and Rogers, Brown & Company, in the distribution of the assets of the Embreeville Company, that had been decreed in the original suit. And this discriminating distribution is made upon the remarkable ground of what is called by the court below a "broad" distribution of assets.

How the word "broad" comes into the case can hardly be apprehended, inasmuch as the word, or the theory upon which it is used, most assuredly finds no place or sanction in the opinion and mandate of this Court in *Blake* v. *McClung*, 172 U. S., 239. The word "broad," as used, is equivalent to the word "discriminate," and constitutes the basis of the discrimination in the distribution of the assets of the Embreville Company in favor of the Tennessee creditors, whereby Blake and Rogers, Brown & Company are given a small percentage of the assets toward their claims, while the Tennessee creditors are then paid their claims in full, principal and interest, and the residue of the estate is applied to the payment of the alien creditors. The object of this scheme of distribution is apparent. If the claims of Blake and Rogers, Brown & Company, which amount to nearly $35,000, with interest, are assimilated to those of the Tennessee creditors, as we claim they should be under the mandate and opinion of this Court, the Tennessee creditors will not be paid in full; if, on the contrary, the present scheme of distribution is allowed to stand, Blake and Rogers, Brown & Company will receive less than $3,000 in all upon their

claims of nearly $35,000, while the Tennessee creditors will be paid in full, principal and interest, and there will be a residue of the assets for the foreign creditors. It seems to us that it is only necessary to call the attention of this Court to this unjust, discriminating, and unwarranted distribution of the assets of the corporation, in order to sustain our contention that the decree of the Tennessee court last entered is *inconsistent* with the mandate and opinion of this Court.

It has been said by this Court that it will consult its own opinion to ascertain what was intended by its mandate, and construe its mandate accordingly. (*In re* Sanford Fork and Tool Co., 106 U. S., 247, and cases cited.) We shall not presume, therefore, to discuss the opinion otherwise than in a general way in the presentation of the claims of the plaintiffs in error.

The two propositions announced at the outset contain the keynote of the opinion; they are both answered in the negative, and the original decree of the court below (Original Record, 69) is found to be repugnant to both propositions, and was reversed for that reason as to Blake and Rogers, Brown & Company.

The second decree, which has been entered for the purpose of giving effect to the opinion and mandate of this Court, if not repugnant to the first of the propositions, is clearly repugnant to the second proposition, inasmuch as it provides for a method of distribution of the assets of the corporation which discriminates against the rights of the plaintiffs in error and in favor of the Tennessee creditors, notwithstanding the status of the

plaintiffs in error has become exactly the same as that of the Tennessee creditors by reason of the reversal of the original decree by this Court as to them.

We submit this case with confidence that when the Constitution of the United States is applied to the questions involved, and the mandate of this Court is construed in the light of its own opinion, full justice will be measured out to the plaintiffs in error.

TULLY R. CORNICK,
HEBER J. MAY,
Attorneys for Plaintiffs in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

STATEMENT OF CASE BY DEFENDANTS IN ERROR.

This cause is before this Court upon a writ of error sued out by Blake and Rogers, Brown & Co.

The subject matter of litigation is the assets of the insolvent Embreville Freehold Land, Iron and Railway Company, limited, amounting in value to about $100,000.00.

That company was a foreign corporation, organized under the laws of the Kingdom of Great Britain and Ireland, for mining and manufacturing purposes; but, prior to the filing of the general creditors' bill to wind it up as an insolvent corporation, it had registered its charter in Tennessee, under Tennessee Act 1877, Ch. 31, which prescribed terms upon which foreign mining and manufacturing companies might locate and carry on business in Tennessee. Under said Act that company acquired a large landed estate in Tennessee and for several years preceding insolvency conducted the business of mining and iron manufacturing, though its principal or home office was in London, England.

The fifth section of the Act of 1877, Ch. 31, is as follows:

"Section 5. That the corporations, and the property "of all corporations coming under the provisions of this "Act, shall be liable for all the debts, liabilities and en- "gagements of the said corporations, to be enforced in "the manner provided by law for the application of the "property of natural persons to the payment of their "debts, engagements and contracts. Nevertheless, cre- "ditors who may be *residents of this State* shall have a "*priority in the distribution of assets*, or subjection of the "same, or any part thereof, to the payment of debts over "all simple contract creditors *being residents of any other* "*country or countries*, and also over mortgage or judg- "ment creditors, for all debts, engagements and contracts "which were made or owing by said corporations pre- "vious to the filing and registration of said valid mort- "gages, or the rendition of such valid judgments, etc."

On November 15, 1895, the Supreme Court of Tennessee passed a decree adjudging that the Act incorporating this particular section, was not unconstitutional as contended by C. G. Blake and Rogers, Brown & Co.; that its provisions awarding priority in the distribution of assets of the insolvent corporation to creditors who resided in Tennessee, did not contravene Constitution of the United States, Article IV, Section 2, or Article XIV of the amendments to the Constitution; but held, on the contrary, that said statute was in all respects a valid enactment. The Supreme Court of Tennessee, therefore,

decree an enforcement of the preference given by said Act to residents of Tennessee over *all non-residents of that State*, including C. G. Blake, Rogers, Brown & Co., individuals residing in the State of Ohio, and the Hull Coal & Coke Co., a body corporate under the laws of Virginia, without *situs* or office in Tennessee.

C. G. Blake, Rogers, Brown & Co., and the Hull Coal & Coke Co., procured the entry of an order severing them from all other creditors standing in the class with them, and prosecuted a writ of error to this Court to have reviewed by it the decree of the Supreme Court in so far as it upheld the statutory preference to creditors who resided in Tennessee. All three of complaining creditors were represented by the same counsel and assigned the same errors.

This court, reviewing the decree of the Supreme Court of Tennessee, adjudged that it was erroneous in respect to the rights of C. G. Blake, and Rogers, Brown & Co., in that it denied them as citizens of Ohio the rights guaranteed them by Article IV, Sec. 2, of the Federal Constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States." It was held that these individual plaintiffs in error were entitled to stand upon the same plane with creditors of like class who were citizens of Tennessee, and could not be denied equality of right simply because they did not reside in that State. The decree of the State Supreme Court was, therefore, reversed in its provisions as to Blake and Rogers, Brown & Co., with costs payable by the creditors residing in Tennessee.

But, it was further held that the Hull Coal & Coke Co. was entitled to no relief under either clause of the Constitution invoked, and the final decree of the State Supreme Court as to it was affirmed with costs adjudged to be paid by that unsuccessful plaintiff in error.

Blake vs. McClung, 172 U. S. 245.

The decree passed by this Court on December 12, 1898, is here quoted, for convenience:

"The judgment of said Supreme Court of Tennessee in this cause as to the Hull Coal & Coke Co. be and the same is hereby, affirmed with costs; and as to the other plaintiffs in error be, and the same is hereby, reversed with costs; and it is further ordered that this cause be, and the same is hereby, remanded to said Supreme Court for further proceedings not inconsistent with the opinions of this Court."

A mandate, embodying the decree, issued out of this Court to the State Supreme Court, where counsel for C. G. Blake and Rogers, Brown & Co. moved in their behalf (and not for Hull Coal & Coke Co., which resisted the motion) for the entry of a decree under the mandate which would incorporate the following—quoting the draft of decree tendered by counsel with their said motion:

"That the effect and purpose of the opinion and mandate of said Supreme Court of the United States, in respect to the rights of C. G. Blake, and Rogers, Brown & Co., in whose favor an order was made reversing said

decree of the 15th day of November, 1895, is to place the said C. G. Blake, and Rogers, Brown & Co., *in the class* and upon exact equality with the Tennessee creditors in respect to the distribution of the assets of said Embreville Company among its creditors."

The Supreme Court of Tennessee declined to enter the decree so tendered, as it did not construe the opinion and mandate of this Court to mean (A) that C. G. Blake, and Rogers, Brown & Co., should enter the preferred class of creditors, and take priority of payment of the assets of the insolvent corporation over the Hull Coal & Coke Company, a Virginia corporation, Julian Kennedy, a citizen of Pennsylvania, or over the British claimants. (B) Further, that Blake, and Rogers, Brown & Co., by their writ of error, and under their assignment of errors in the Supreme Court of the United States, prevailed to the extent of having declared unconstitutional that provision of Act of 1877, which and so far as it subjected and postponed them to the satisfaction of residents of Tennessee; that the terms of the opinion, decree and mandate would be satisfied by awarding to Blake, and Rogers, Brown & Co. such pro ratas as they would have been entitled to at common law.

Opinion Tennessee Supreme Court, Tr. 4-7.

BRIEF FOR DEFENDANTS IN ERROR.

(*A*) *Is that a proper construction of the opinion, decree and mandate of this Court which would cause C. G. Blake, and Rogers, Brown & Co., to be classed with residents of Tennessee, and thus to take, by virtue of Act*

of 1877, Ch. 31, or the decree of this Court, priority over Hull Coal & Coke Co., Julian Kennedy or non-residents of Tennessee?

The claimants to the funds produced by a sale of the assets of the insolvent Embreville Company were attempted to be classed as follows by the legislation embodied in Tennessee Act 1877, Ch. 31:

(a) A *preferred class*—residents of Tennessee; and (b) a subjected or postponed class—all non-residents of Tennessee.

In the light of the rulings by this Court in this cause (Blake vs. McClung) on appeal, the claimants may be classified as follows:

(a) The class named for preference by the statute—residents of Tennessee.

(b) Individual citizens of States other than Tennessee; and herein a subdivision: (1) Prevailing or redressed citizens—Blake, and Rogers, Brown & Co., and (2) non-appealing citizens—Julian Kennedy and others.

(c) Non-resident corporations—such as Hull Coal & Coke Co.—and aliens.

There can be no doubt but that Blake, and Rogers, Brown & Co., are decreed to be entitled to the relief of being taken from the subjected class; but our insistence is that this Court did not mean to rule, that these two creditors are entitled to enter the class *preferred* by statute, and swell that class, subjecting and postponing

to the payment of their own claims, the claims of the Hull Coal & Coke Co., Julian Kennedy, and the British creditors.

The attempt of the draftsman of the decree, tendered to the Supreme Court of Tennessee for entry, was not merely to remove Blake, and Rogers, Brown & Co. from the *subjected class*, but to place them in the preferred class. Our insistence is that these citizens of Ohio should be taken from the subjected class, but that they cannot be placed in the preferred class.

The effect of the insistence of Blake, and Rogers, Brown & Co., was carried to the point of urging that the effect of the rulings of the court was to enlarge the preferred class by the admission of themselves into it with the result that all Tennessee creditors *and these two non-resident citizens* should be satisfied before anything should be paid to Hull Coal & Coke Co., Julian Kennedy, or aliens—a result that leaves *nil* for the last named.

The counsel for Blake, and Rogers, Brown & Co., in the State Court based his clients' right to the decree presented upon this isolated clause in the opinion of the Supreme Court of the United States, to-wit:

"We adjudge that when the general property and "assets of a private corporation, lawfully doing business "in a State, are in course of administration by the courts "of such State, creditors who are citizens of other States "are entitled, under the Constitution of the States, to "stand upon the same plane with creditors of like class "who are citizens of such State, and cannot be denied

"equality of right simply because they do not reside in "that State but are citizens residing in other States of "the Union. The individual plaintiffs in error were "entitled to contract with this British corporation law- "fully doing business in Tennessee, and deemed and "taken to be corporations of that State; and no rule in "the distribution of its assets among creditors could be "applied to them as resident citizens of Ohio, and because "they were not citizens of Tennessee, that was not applied "by the Courts of Tennessee to creditors of like character "who were citizens of Tennessee." 172 *U. S. Rep.*, 259.

If this clause was all of the opinion, there could be but little doubt as to the correctness of the position taken by the solicitor of C. G. Blake, and Rogers, Brown & Co. It is, however, only an isolated clause, and when it is read in the light of the balance of the opinion it does not support the claim of these parties to be placed "*in the class*" with the Tennessee creditors in respect to the distribution of the assets of said corporation among its creditors, *and thereby obtain an unwarranted priority of payment* over the Hull Coal & Coke Co., Julian Kennedy, and the aliens.

THIS PRIORITY NOT WARRANTED BY THE STATUTE.

The Act of 1877 does not give, or purport to give, citizens of other States of the Union who are non-residents of the State of Tennessee the right of priority of payment over non-resident corporations, non-appealing citizens and alien creditors. The priority given by this statute is in favor of residents of Tennessee *alone*. The

court evidently did not mean to enlarge this class, by making the statute read that "residents of Tennessee *and individual creditors of other States of the Union* shall have priority over aliens, non-resident corporations, etc." That would be to assume the function of the State Legislature, or to reform the statute to speak a meaning the Legislature never intended.

A calculation serves to make clearer how indefensible is this position of Blake, and Rogers, Brown & Co.: The assets to be distributed amount, in round numbers, to $100,000,00. The claims of residents of Tennessee amount to, say, $87,000.00, at this date. This would leave $13,000.00 to be distributed under the classification and rule laid down by Act 1877; that is, to be divided among the members of the subjected class; to-wit: Blake, Rogers, Brown & Co., aliens, non-resident corporations, etc. The claims of Blake, and Rogers, Brown & Co., amount to, say, $33,000.00 at this date; and the claims of all other non-residents of Tennessee, likely to be proven, amount to, say, $480,000.00 (for purpose of illustration). *All* claims of non-residents aggregate about $513,000.00, and to all these non-residents there would be going (on the statutory basis) the $13,000.00 balance left after satisfying the residents of Tennessee. Thus, under a distribution made under the statute, Blake, and Rogers, Brown & Co. would have received a pro rata of 2½ cents on the dollar.

But under the decree of the Supreme Court of the United States, Blake, and Rogers, Brown & Co., are taken from the subjected class, leaving as the only

creditors subjected to the preferred class the aliens and other non-appealing and unredressed non-residents, such as Julian Kennedy; and the distribution should be as follows: Divide the $100,000.00 of assets between *all* creditors, share and share alike according to the amount of their respective claims. All claims, above given, aggregate $600,000.00. This gives to each creditor 16⅔ cents on the dollar. Blake, and Rogers, Brown & Co., by their writ of error, get this measure of relief—an increase of pro rata from 2½ cents to 16⅔ cents on the dollar.

The amount going to aliens and other unredressed non-resident creditors (on their claims aggregating $480,000.00) would be $80,000.00. The amount going to residents of Tennessee on their claims aggregating $87,000.00 would, on pro rata of 16⅔ cents, be $14,500.00, leaving them lacking $72,500.00 to pay them in full. Therefore, the aliens and non-residents (not including Blake, and Rogers, Brown & Co.) contend that they have a right to satisfy the terms of the statute by paying out of the $80,000.00, pro rated to them on their demand, this $72,500.00 required to pay in full residents of Tennessee. *Thus the aliens would have left $7,500.00.* If we assume that the claims, proven and to be proven, by aliens and non-residents other than Blake, and Rogers, Brown & Co. would exceed $480,000.00 then the sum thus left to them would be increased beyond $7.500.00.

The contention of Blake, and Rogers, Brown & Co., if allowed as the correct construction of the decree and

mandate of this Court, would result in adding to the $87,000.00 of Tennessee residents' claims, their two claims aggregating $33,000.00, making a grand aggregate of $120,000.00 entitled to be paid in full out of the $100,000.00 of assets, thus giving to Tennessee claimants and to Blake, and Rogers, Brown & Co. eighty cents on the dollar, *and leaving Hull Coal & Coke Co., Julian Kennedy, and all in like attitude, and the aliens more than $20,000.00 distant from the assets.*

It is earnestly contended in behalf of the last named that this result cannot come *by virtue of anything in the Tennessee Act, 1877, Ch. 31.* After satisfying the requirements of that Act, these claimants may yet retain the balance of their pro ratas so far as the *statute* affects their rights. Blake, and Rogers, Brown & Co., assail the preference granted by this Act as unconstitutional; they now seek to enforce the same preference in their own favor against Hull Coal & Coke Co., and others.

THIS PRIORITY OF BLAKE NOT WARRANTED BY DECREE OF NOVEMBER 15, 1895.

The decree of the Supreme Court of Tennessee, of date November 15, 1895, declares that the *Tennessee creditors* shall have the right of priority of payment over all the other creditors of the Embreville Company out of its assets, and that after the Tennessee creditors have been paid in full the balance of the assets shall be distributed ratably between Rogers, Brown & Co., C. G. Blake, the Hull Coal & Coke Co., Julian Kennedy,

and the English creditors, *without preference or priority in favor of any of them.* (*Blake vs. McClung*, 172 *U. S.* 275.) It is clear, therefore, that Rogers, Brown & Co., and C. G. Blake, cannot claim priority over the Hull Coal & Coke Co., Julian Kennedy, and the English creditors under or *by virtue of the decree of the Supreme Court of the State of Tennessee.*

PRIORITY OF BLAKE OVER NON-RESIDENT NOT WARRANTED BY DECREE OF THIS COURT.

This Court when it came to consider the cause on writ of error to the above decree of the Tennessee Supreme Court, had before it an adjudication that a *fixed amount;* to-wit: the sums due to residents of Tennessee, $87,000.00, should be paid before any non-resident of Tennessee should have resort to the assets. Where in its opinion or decree is there to be found an intimation that this sum should be increased for any reason? Where in the assignment of errors relied upon by Blake, and Rogers, Brown & Co., is there to be found any claim that the $87,000.00 of perferred claims should be $120,000.00? The argument of plaintiffs in error in *Blake vs. McClung* was, rather, directed against the validity of any preference as between claim.

Test from Standpoint of Hull Coal & Coke Company. —The insistence of Blake, and Rogers, Brown & Co., now being combatted; goes to the extent of exhausting the assets for the benefit of Blake, and Rogers, Brown & Co., and denying to their former associate plaintiff in

error the Hull Coal & Coke Co., against its protest, any share in the remainder left after satisfaction of the sum required by the statute—$87,000.00. We have seen that the Legislature did not by its enactment, mean through it to give to Blake a priority over the Hull Coal & Coke Co. Can it be said that this statute, without so intending it, avails, by reason of the unconstitutionality of one of its phases, to give 80 cents on the dollar to Blake, whereas without the statute and on a common law basis he would have received but 16⅔ cents;—that without the statute, the Hull Coal & Coke Co., is entitled to 16⅔ cents, and yet under the statute, after satisfying the terms of the statute in paying Tennessee creditors in full, this corporation can be called upon to yield further to Blake, and Rogers, Brown & Co., its portion of the remnant of $7,500.00? It cannot be argued that the Hull Coal & Coke Company must lose such portion because it failed to follow up and assert its rights—constitutional, statutory or common law. That Company was equal in diligence with Blake, and Rogers, Brown & Co. It joined them in the writ of error, whatever errors they assigned were at the same time assigned by it, every argument made in their behalf was made for it as well. Both together inveighed against the preference prescribed by statute, but the Hull Coal & Coke Co. now finds that preference claimed by its former co-plaintiffs *against it*, and is confronted with an argument that when it, the Hull Coal & Coke Co. appealed from the decree of the Supreme Court of Tennessee to this Court, asking for a fuller measure of relief than was

there granted it, it lost the portion that was preserved to it by the decree appealed from.

Test from Standpoint of Julian Kennedy.—May Julian Kennedy, a creditor who is a citizen of Pennsylvania (Tr. 16, 141, p. 46), standing on the very same plane as to privileges and immunities with Blake, and Rogers, Brown & Co. after he has exercised his volition not to complain of the decree of November 15, 1895, and to submit to a satisfaction of the demand of the statute, be made to stand and see the remainder of his pro rata go to Blake, and Rogers, Brown & Co.? Can Blake claim that he shares with residents of Tennessee in such a manner as to *subject* Kennedy to the satisfaction of his, Blake's claim? Such contention in Blake's behalf, if adopted and enforced, would cause the decree of this Court to give priority of satisfaction to a citizen of Ohio (Blake) over a citizen of Pennsylvania (Kennedy) while denying the right of priority of a citizen of Tennessee over that same citizen of Ohio.

Test from Standpoint of Aliens.—Respecting the rights of the aliens, this Court said in its opinion: "What may be the effect of the judgment of this Court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the Court on this writ of error." It would seem, therefore, that this Court did not intend to disturb the decree of the Supreme Court of Tennessee in respect to the alien creditors. Certain it is there was no error assigned in *Blake vs. McClung* that would have

called this Court to decide whether or not the aliens would lose to Blake, and Rogers, Brown & Co., their interest in the $7,500.00 remainder; neither the appeal nor any assignment of error was directed against the aliens, who may rely upon the principle of *res adjudicata* to protect the rights decreed them by the decree of November 15, 1895.

(B) *May C. C. Blake, and Rogers, Brown & Co. complain of a decree which, while giving them their common law rights, yet postpones aliens and non-resident corporations to the prior payment of residents of Tennessee.*

We submit that the only point adjudged by this Court in the decree disposing of the writ of error sued out in *Blake vs. McClung* was this: that the individual plaintiffs in error could not constitutionally be postponed until after the residents of Tennessee were paid in full. Under the latest decree of the Supreme Court of Tennessee they are not postponed, but are given the same plane as residents of Tennessee in a broad distribution of the assets.

"May a State exclude citizens of other States from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other States, and not citizens of the State in which administration occurs? These questions are presented for our determination."

Blake vs. McClung, 172 U. S. 247.

RIGHTS GUARANTEED ARE COMMON LAW RIGHTS.

It would seem that if Blake, and Rogers, Brown & Co., are granted every right and privilege they would have had at common law, or had the Act 1877, never been passed, they cannot complain that others have been denied like right.

"The Constitution forbids only such legislation affecting citizens of the respective states as will substantially or practically put a citizen of one State in a condition of alienage when asserting in another State *the rights that commonly appertain* to those who are a part of the political community known as the People of the United States."

Blake vs. McClung, 172 U. S. 256.

CONSTITUTIONALITY OF PREFERENCE OVER NON-CITIZENS ESTABLISHED.

This Court, upon the errors assigned by a non-resident corporation, held constitutional that the preference awarded by Act 1877, Ch. 31, to residents of Tennessee over such non-citizens, and affirmed the decree of the State Supreme Court in respect of that claim. By what authority must the only members of the class thus preferred over non-citizens by statute, which preference is sustained as constitutional, lose it or have it impaired?

TENNESSEANS HAVE RIGHTS SECURED TO THEM BY DOCTRINE OF RES ADJUDICATA.

The same results for creditors who reside in Tennessee, and for non-citizens who reside outside of Tennessee may be worked out through the doctrine of *res adjudicata*:

Had Blake, and Rogers, Brown & Co. not prosecuted their writ of error to the Supreme Court of the United States, the decree of the State Supreme Court would have been left in irrevocable force, giving priority to residents of Tennessee over (1) Blake, and Rogers, Brown & Co., and (2) all other non-resident American and British creditors. By their writ of error Blake, and Rogers, Brown & Co., succeeded in reversing that portion of the decree of November 15, 1895, which provided that they should be postponed to Tennessee creditors, but the plain import of the opinion and decree of this Court is to leave the decree of November 15, 1895, unchanged in so far as residents of Tennessee were granted priority over class (2) *supra:* all other non-residents.

Engraft upon the decree of November 15, 1895, the decree of this Court, and the result will be that the decree of November 15, 1895, is effective to give priority over class (2): all other non-residents, to residents of Tennessee and to them alone.

Test by claim of Julian Kennedy.—As we have seen Julian Kennedy is a creditor who resides in Pennsylvania, recovering judgment on a claim above $5,000.00. Clearly Julian Kennedy would have been given the same measure of relief that this court gave to C. G. Blake, had he prosecuted a writ of error. He, however, elected to acquiesce in the decree of the State Court, allowing it to remain in full force, and he declined to join in the writ of error; submitting to severance to that end. (Tr. 16, 141, pp. 70-71.) This clearly left his

claim *postponed by final decree* to the prior satisfaction of residents of Tennessee. This postponement now appears to have been unconstitutional, but the preference has passed into *res adjudicata*. Tennessee residents do not hold this preference constitutionally, but in the face of the constitutional clause which Kennedy might have invoked. By what right may C. G. Blake share with residents of Tennessee this right of priority over Kennedy which they gain solely under the doctrine of *res adjudicata*. Had Kennedy joined Blake in the prosecution of the writ of error, Blake would not have benefited one cent thereby. But Kennedy did not appeal, and we fail to see how Blake can be the beneficiary of his failure; but we conceive on the contrary that the decree of the State Supreme Court availed to give residents of Tennessee alone the benefit of such election on the part of Kennedy.

Test by claim of Hull Coal & Coke Company.—As we have already seen the decree of the State Supreme Court as to the Hull Coal & Coke Company was not reversed, not modified, but affirmed with costs. The decree of that Court of date November 15, 1895, provided that residents of Tennessee, and not others, should have the benefit of priority of the $87,000.00 in amount, as aforesaid, over this unsuccessful plaintiff in error, the Hull Coal & Coke Co.

Test by claims of aliens.—The alien creditors did not join in the writ of error. Therefore, it would seem that they are left in the same position in all respects with Julian Kennedy. This Court declined to pass upon their

rights, upon hypotheses of appeal and non-appeal by them. This left the provisions of decree of November 15, 1895, touching their claims unaffected by the decree of this Court. If we were to assume an appeal by the aliens, then we also assume that this Court would have decreed thereon either (1) that they were non-citizens and classable with the Hull Coal & Coke Co., and affirmed the decree as to their claims in manner above indicated; or (2) that they were entitled to constitutional protection along with Blake. In neither event would Blake be a beneficiary of the appeal by aliens. How then may Blake benefit by their failure to appeal?

But this Court was yet more specific in its ruling touching the claims of aliens: "What may be the effect of the judgment of this Court in the present case upon the rights of creditors not residing in the United States, it is not necessary to decide. Those creditors are not before the Court on this writ of error."

If this Court either forbore or failed to adjudge as to this point, is not the decree of November 15, 1895, left in full force in respect thereof, in all of its provisions?

NO CONSIDERATION OF NEW QUESTIONS OR CHANGE OF DECREE AT THIS STAGE.

If the court did not actually pass upon the question of Blake's right to share with residents of Tennessee their rights by reason of *res adjudicata* against the Hull Coal & Coke Co., or against Julian Kennedy, or, again, if the Court did not take into judgment the right of Blake

to enter the preferred class, so as to enlarge it and thereby submerge the claims of Hull Coal & Coke Co., and all unredressed non-residents, then the Court would not now consider same or any change in the decree as passed.

Hill vs. Chicago, etc., R. R. Co., 140 U. S. 52.

This is true even where there is a second appeal in a cause.

Northern Pacific Co. vs. Ellis, 143 U. S. 52;
Great Western Tel. Co. vs. Burnham, 162 U. S. 339, and cases therein cited.

The principle of *res adjudicata* on a second appeal of the same cause applies to all questions which might have been decided as materially involved, whether actually decided or not.

2 Enc. Pl. & Pr. 380, and cases cited.

S. C. WILLIAMS,
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Attorneys for Defendants in Error.

BLAKE *v.* McCLUNG.

ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

No. 466. Submitted December 18, 1899.—Decided January 8, 1900.

The decision in *Blake* v. *McClung*, 172 U. S. 239, referred to; and it is held that the judgment now under review was not in conformity with the opinion and mandate in that case — the court adjudging, as it had adjudged in the previous case, that when the general property and assets of a private corporation, lawfully doing business in a State, are in the course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand *in all respects* upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union.

THE case is stated in the opinion of the court.

Mr. Tully R. Cornick and *Mr. Heber J. May* for plaintiffs in error.

Mr. S. C. Williams and *Mr. John W. Green* for defendants in error.

MR. JUSTICE HARLAN delivered the opinion of the court.

This case has been heretofore in this court upon writ of error brought to review a final decree of the Supreme Court of Tennessee. *Blake* v. *McClung*, 172 U. S. 239.

That decree was rendered in a suit instituted by C. M. McClung & Co. for the administration of the property and affairs of the Embreeville Freehold, Land, Iron and Railway Company, Limited — an insolvent British mining and manufacturing company doing business in Tennessee. Among the creditors who filed intervening petitions in the suit were C. G. Blake, a citizen of Ohio; Rogers, Brown & Company, the members of which firm were also citizens of Ohio; and the Hull Coal & Coke Company, a corporation of Virginia.

It was adjudged by the Supreme Court of Tennessee that all the creditors of the British corporation who resided in Tennessee were entitled to priority of payment out of its assets, real and personal, over all other creditors who did not reside in Tennessee, whether they were residents of other States of the United States or of the Kingdom of Great Britain; and that all creditors residing out of Tennessee, whether in other States of the Union or in the Kingdom of Great Britain, had the right and must share equally and ratably in the distribution of the assets of the company after the residents of Tennessee should have been first paid in full.

The decree so rendered was in conformity with a statute of Tennessee passed March 19, 1877, the fifth section of which provided: "That the corporations, and the property of all corporations coming under the provisions of this act, shall be liable for all the debts, liabilities and engagements of the said corporations, to be enforced in the manner provided by law, for the application of the property of natural persons to the payment of their debts, engagements and contracts. Nevertheless, creditors who may be *residents of this State* shall have *a priority in the distribution of assets, or subjection of the same, or any part thereof, to the payment* of *debts over all simple contract creditors, being residents of any other country or countries*, and also over mortgage or judgment creditors, for all debts,

engagements and contracts which were made or owing by the said corporations previous to the filing and registration of such valid mortgages, or the rendition of such valid judgments. But all such mortgages and judgments shall be valid, and shall constitute a prior lien on the property on which they are or may be charged as against all debts which may be incurred subsequent to the date of their registration or rendition. The said corporations shall be liable to taxation in all respects the same as natural persons resident in this State, and the property of its citizens is or may be liable to taxation, but to no higher taxation, nor to any other mode of valuation, for the purpose of taxation; and the said corporations shall be entitled to all such exemptions from taxation which are now or may hereafter be granted to citizens or corporations for the purpose of encouraging manufacturers in this State, or otherwise." Acts of Tennessee 1877, c. 31, p. 44.

The validity of that statute was drawn in question by Blake and Rogers, Brown & Company as well as the Hull Coal & Coke Company, who specially claimed that the judgment based upon the statute had denied to them respectively rights secured by the second section of the Fourth Article of the Constitution of the United States, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States," as well as by the first section of the Fourteenth Amendment, declaring that no State shall "deprive any person of life, liberty or property without due process of law," nor "deny to any person within its jurisdiction the equal protection of the laws."

The Supreme Court of the State sustained the constitutionality of the statute, and from its final judgment Blake and Rogers, Brown & Company, and the Hull Coal & Coke Company, prosecuted a writ of error to this court.

The general question presented for determination by this court was thus stated in its opinion: "Beyond question, a State may through judicial proceedings take possession of the assets of an insolvent foreign corporation within its limits, and distribute such assets or their proceeds among creditors according to their respective rights. But may it exclude

citizens of other States from such distribution until the claims of its own citizens shall have been first satisfied? In the administration of the property of an insolvent foreign corporation by the courts of the State in which it is doing business, will the Constitution of the United States permit discrimination against individual creditors of such corporation because of their being citizens of other States, and not citizens of the State in which such administration occurs?"

Upon a review of prior decisions this court said: "The foundation upon which the above cases rest cannot however stand, if it be adjudged to be in the power of one State, when establishing regulations for the conduct of private business of a particular kind, to give its own citizens essential privileges connected with that business which it denies to citizens of other States. By the statute in question the British company was to be deemed and taken to be a corporation of Tennessee, with authority to carry on its business in that State. It was the right of citizens of Tennessee to deal with it, as it was their right to deal with corporations created by Tennessee. And it was equally the right of citizens of other States to deal with that corporation. The State did not assume to declare, even if it could legally have declared, that that company, being admitted to do business in Tennessee, should transact business only with citizens of Tennessee, or should not transact business with citizens of other States. No one would question the right of the individual plaintiffs in error, although not residents of Tennessee, to sell their goods to that corporation upon such terms in respect of payment as might be agreed upon, and to ship them to the corporation at its place of business in that State. But the enjoyment of these rights is materially obstructed by the statute in question; for this statute, by its necessary operation, excludes citizens of other States from transacting business with that corporation upon terms of equality with citizens of Tennessee. By force of the statute alone, citizens of other States, if they contracted at all with the British corporation, must have done so subject to the onerous condition that if the corporation became insolvent its assets in Tennessee should

first be applied to meet its obligations to residents of that State, although liability for its debts and engagements was 'to be enforced in the manner provided by law for the application of the property of natural persons to the payment of their debts, engagements and contracts.' But, clearly the State could not in that mode secure exclusive privileges to its own citizens in matters of business. If a State should attempt, by statute regulating the distribution of the property of insolvent individuals among their creditors, to give priority to the claims of such individual creditors as were citizens of that State over the claims of individual creditors, citizens of other States, such legislation would be repugnant to the Constitution upon the ground that it withheld from citizens of other States as such, and because they were such, privileges granted to citizens of the State enacting it. Can a different principle apply, as between individual citizens of the several States, when the assets to be distributed are the assets of an insolvent private corporation lawfully engaged in business and having the power to contract with citizens residing in States other than the one in which it is located?"

Referring to the established rule that the property of a corporation was a trust fund for the payments of its debts in the sense that when it is lawfully dissolved and its affairs closed, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among stockholders, this court further said: "These principles obtain, no doubt, in Tennessee, and will be applied by its courts in all appropriate cases between citizens of that State, without making any distinction *between them*. Yet the courts of that State are forbidden, by the statute in question, to recognize the right in equity of citizens residing in other States to participate upon terms of equality with citizens of Tennessee in the distribution of the assets of an insolvent foreign corporation lawfully doing business in that State. We hold such discrimination against citizens of other States to be repugnant to the second section of the Fourth Article of the Constitution of the United States, although, generally speaking, the State has the power to pre-

scribe the conditions upon which foreign corporations may enter its territory for purposes of business. Such a power cannot be exerted with the effect of defeating or impairing rights secured to citizens of the several States by the supreme law of the land. Indeed, all the powers possessed by a State must be exercised consistently with the privileges and immunities granted or protected by the Constitution of the United States."

Again: "The statute of Tennessee did not make it a condition of the right of the British corporation to come into Tennessee for purposes of business that it should, at the outset, deposit with the State a fixed amount to stand exclusively or primarily for the protection of its Tennessee creditors. It allowed that corporation, after complying with the terms of the statute, to conduct its business in Tennessee as it saw fit, and did not attempt to impose any restriction upon its making contracts with or incurring liabilities to citizens of other States. It permitted that corporation to contract with citizens of other States, and then, in effect, provided that all such contracts should be subject to the condition (in case the corporation became insolvent) that creditors residing in other States should stand aside, in the distribution by the Tennessee courts of the assets of the corporation, until creditors residing in Tennessee were fully paid — not out of any funds or property specifically set aside as a trust fund, and at the outset put into the custody of the State, for the exclusive benefit, or for the benefit primarily, of Tennessee creditors, but out of whatever assets of any kind the corporation might have in that State when insolvency occurred. In other words, so far as Tennessee legislation is concerned, while this corporation could lawfully have contracted with citizens of other States, those citizens cannot share in its general assets upon terms of equality with citizens of that State. If such legislation does not deny to citizens of other States, in respect of matters growing out of the ordinary transactions of business, privileges that are accorded to it by citizens of Tennessee, it is difficult to perceive what legislation would effect that result. We adjudge that when the general property and assets of a private

corporation, lawfully doing business in a State, are in the course of administration by the courts of such State, creditors who are citizens of other States are entitled, under the Constitution of the United States, to stand upon the same plane with creditors of like class who are citizens of such State, and cannot be denied equality of right simply because they do not reside in that State, but are citizens residing in other States of the Union. The individual plaintiffs in error were entitled to contract with this British corporation, lawfully doing business in Tennessee, and deemed and taken to be a corporation of that State; and no rule in the distribution of its assets among creditors could be applied to them as resident citizens of Ohio, and because they were not residents of Tennessee, that was not applied by the courts of Tennessee to creditors of like character who were citizens of Tennessee."

In relation to the Hull Coal & Coke Company this court held that it was not a citizen of the United States within the meaning of the second section of the Fourth Article of the Constitution; and although a "person" within the meaning of the Fourteenth Amendment that company was not deprived of its property without the due process of law guaranteed by that amendment, and not being within the jurisdiction of Tennessee it could not invoke the protection of the clause forbidding the denial by a State of the equal protection of the laws to persons within its jurisdiction.

By the final order of this court the judgment of the state court was affirmed as to the Hull Coal & Coke Company, upon the ground that no right, privilege or immunity secured to it by the Constitution of the United States had been denied. As the other plaintiffs in error — Blake and Rogers, Brown & Company — the judgment was reversed, and the cause remanded for further proceedings not inconsistent with the opinion of this court.

After the decision here, the cause was again heard in the Supreme Court of Tennessee on the motion of Blake and Rogers, Brown & Company for a decree in conformity with the opinion and mandate of this court.

That court adjudged: "1. That the effect and purpose of

the opinion and mandate of the Supreme Court of the United States in respect to the rights of C. G. Blake and Rogers, Brown & Company, is to adjudge and decree that the said C. G. Blake and Rogers, Brown & Company are entitled to participate in the assets of the said Embreeville Freehold, Land, Iron and Railway Company, Limited, upon the basis of a broad distribution of the assets of said corporation among all of its creditors, without preference or priority, as though the act of 1877, chap. 31, had not been passed; and it is ordered that there be made a computation of the aggregate indebtedness due from the said insolvent corporation to its creditors of every class, wherever residing, and that there shall be paid to the said C. G. Blake, and the said Rogers, Brown & Company, the percentage and proportion which is found to be due to them as creditors of said corporation in the aggregate of assets thus ascertained. 2. It is further adjudged and decreed, that after thus setting apart to the said C. G. Blake, and Rogers, Brown & Company the proportion and percentage thus found to be due to them, that all the rest and residue of the estate of the said Embreeville Freehold, Land, Iron and Railway Company, Limited, is applicable *first* to the payment of the indebtedness due to the creditors of said corporation *residing within the State of Tennessee*, as provided in section 5 of chapter 31 of the acts of Tennessee, 1877, and that the residue of said estate, if any, shall then be applied *pro rata* to the payment of the debts of the alien and non-resident creditors of said corporation, other than the said C. G. Blake, and Rogers, Brown & Company." The cause was remanded to the court of original jurisdiction for the collection and distribution of the fund then in that court, and for the making of such further orders as might be found necessary to the final settlement of the cause. Mr. Justice Beard dissented upon grounds stated in his opinion which is published in 52 S. W. Rep. 1001.

Blake and Rogers, Brown & Company excepted to the action of the state court "in determining that creditors residing in Tennessee were entitled under the act of 1877, c. 31, § 5, to any priority or preference, by way of increased

percentages in distribution" over them, on the ground that such priority and preference was in violation of section 2 of Article IV of the Constitution of the United States, and was not consistent with the opinion and mandate of this court. The present writ of error was brought to review the last judgment.

We are constrained to hold that the judgment of the Supreme Court of Tennessee is not in conformity with the opinion and mandate of this court. The thought expressed in our former opinion was that Blake and Rogers, Brown & Company, citizens of Ohio and general creditors of the Embreeville Freehold, Land, Iron and Railway Company, were entitled in the distribution in Tennessee of the assets of that insolvent corporation, to stand upon the same plane with citizens of Tennessee who were also general creditors of the same corporation; and that the judgment of the state court heretofore under review, 172 U. S. 539, so far as it gave priority to citizens of Tennessee over citizens of other States, was inconsistent with the second section of the Fourth Article of the Constitution of the United States, providing that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

By the judgment now under review certain creditors, solely because of their being citizens of Tennessee, are accorded advantages in the distribution of the assets in question which are denied to other creditors solely because of their being citizens of another State than Tennessee. That judgment gives to the plaintiffs in error respectively their percentage of the entire assets of the insolvent corporation upon the basis of equality among *all* the creditors, *wherever residing*, and that being done, the court in effect directs the idea of equality among all creditors to be abandoned, and "all the rest and residue of the estate" of the insolvent corporation to be applied *first* to the payment of the debts due to citizens of Tennessee. Thus the decree gave a decided advantage to Tennessee creditors over Ohio creditors, when, as Mr. Justice Beard correctly said, the cause was remanded by this court substantially with direction that the state court should see

to it that no advantage accrued to Tennessee creditors over the Ohio creditors.

It is not within the province of this court to prescribe the form of a decree to be entered for the distribution of the assets in question. But it is both its province and duty to adjudge, in accordance with the supreme law of the land, as we now do, that the plaintiffs in error, citizens of Ohio, are entitled to share in the distribution of the assets of this insolvent corporation upon terms of equality, in all respects, with like creditors who are citizens of Tennessee. No decree giving to the latter privileges or advantages that are denied to the former is, as we have heretofore adjudged, consistent with the Constitution of the United States. In the distribution of what is called in the decree "all the rest and residue of the estate of the Embreeville Freehold, Land, Iron and Railway Company," or in the proceeds thereof, the plaintiffs in error should be placed upon the same plane of equality with Tennessee creditors. The plaintiffs in error cannot be denied participation in any of the assets of the insolvent corporation that are taken into account when ascertaining the rights of the Tennessee creditors and the amounts to be paid to them on their respective demands. Whatever rule is applied for the benefit of the latter must be applied in behalf of the Ohio creditors.

The judgment is reversed, and the cause remanded for such further proceedings as may be consistent with this opinion.